IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-1304

JEROME S. WAGSHAL,

Petitioner,

v.

THE HONORABLE JOSEPH A. CALIFANO, JR., invidually and as Secretary of Health, Education, and Welfare; THE HONORABLE ROY L. ASH, individually and as Director of the Office of Management and Budget; BERTRAM S. BROWN, M.D., individually and as Director of the National Institute of Mental Health; THE HONORABLE GEORGE PRATT SCHULTZ, individually and as Secretary of the Treasury; ELMER B. STAATS, individually and as Comptroller General of the United States;

National Council of Community Mental Health Centers, Inc., Palm Beach County Comprehensive Community Mental Health Center, Inc., The Buffalo General Hospital; Columbia Area Mental Health Center; Alameda County, California; Central City Community Mental Health Association, Incorporated; Highline-West Seattle Mental Health Association;

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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OPINIONS BELOW

This petition seeks reversal of a decision denying a fee award to an attorney who successfully represented a plaintiff class. There are three lower court opinions, the

original decision on the merits, the district court's opinion awarding a fee, and the court of appeals' opinion overturning the fee award. These are:

1. The decision on the merits: *National Council of Community Mental Health Centers, Inc. v. Weinberger,* 361 F.Supp. 897 (D.D.C. 1973), hereinafter referred to as *"NCCMHC I,"* and set out *infra* in the Appendix 4a-14a. This was preceded by a preliminary injunction. 1a-3a.

2. The fee award by the district court: *National Council of Community Mental Health Centers, Inc. v. Weinberger,* 387 F.Supp. 991 (D.D.C. 1974), hereinafter referred to as *"NCCMHC II,"* and set out *infra,* 15a-25a.

3. The decision of the court of appeals reversing the fee award is unreported: *National Council of Community Mental Health Centers, Inc. v. Mathews,* Nos. 75-1335 and 75-1353 (D.C. Cir. decided Nov. 9, 1976, rehearing den. January 13, 1977), set out *infra,* 26a-36a.

Related petitions for certiorari in this Court, and a related appeal pending in the court of appeals are noted, *infra,* pp. 14, in the statement of the case.

JURISDICTION

The court of appeals denied a timely petition for rehearing on January 13, 1977. 37a. This petition is filed within ninety days of that date. This Court has jurisdiction under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. When an attorney who represented a duly certified plaintiff class of community mental health centers, and who was retained by their national organization and six community mental health centers as class representatives

under an arrangement contemplating a "common benefit" fee award from the class members if the case were successful, obtained the release of over $52,000,000 in federal grant funds plus other substantial benefits for the class, did the court of appeals err in reversing an order of the district court awarding a fee to the attorney under the "common benefit" principle, and specifically:

A. Did the court of appeals err in holding that the attorney could not be paid from a portion of the released grant funds which remained "unused" by the grantee-class members, and that 28 U.S.C. § 2412 barred such use of the grant funds, when three other statutes required the full release of the funds, prevented the federal government from retaining the money, and made the funds fully available for obligation pursuant to court order.

B. Did the court of appeals err in holding that the district court lacked *in personam* jurisdiction to order the class members to pay a fee directly to the attorney who successfully represented the class, on the ground that the plaintiff class was inadequately represented in the fee application proceeding, when (i) the class members were given adequate notice of the fee application and an opportunity to appear and oppose it; and (ii) several class representatives did so appear by separate counsel.

C. Did the court of appeals err in failing to provide any means or procedure by which the "common benefit" principle could be vindicated by a fee award in this case.

2. Were the standards applied by the district court in setting the amount of the fee and affirmed by the court of appeals, correct, and specifically:

A. Was the district court correct in relegating attorneys who serve the public interest in class actions to a lesser economic status than those who devote themselves to commercial practice.

B. Was the district court correct in refusing to award a fee which reflected the risk of no fee recovery, *i.e.*, the contingency.

C. Was the district court correct in setting a fee by its "feel" of the case without specifying what value it was placing on the various factors which it considered.

STATUTES INVOLVED

28 U.S.C. §2412, 80 Stat. 308

> Except as otherwise specifically provided by statute a judgment for costs, as enumerated in section 1920 of this title but not including the fees and expenses of attorneys may be awarded to the prevailing party in any civil action brought by or against the United States or any agency or official of the United States acting in his official capacity, in any court having jurisdiction of such action. . . .

31 U.S.C. §665b, 87 Stat. 134

> Any provision of law which requires unexpended funds to return to the general fund of the Treasury at the end of the fiscal year shall not be held to affect the status of any lawsuit or right of action involving the right to those funds.

42 U.S.C.A. §2661 note, 84 Stat. 353 (hereinafter "Sec. 601")

> Notwithstanding any other provision of law, unless enacted after the enactment of this Act expressly in limitation of the provisions of this section, funds appropriated for any fiscal year ending prior to July 1, 1973, to carry out any program for which appropriations are authorized by . . . the Mental Retardation Facilities and Community Mental Health Centers Construction Act of 1963 (Public Law 88-164, as amended) shall remain available for obligation and expenditure until the end of such fiscal year.

Pub.L. 93-245, §501, 87 Stat. 107 (hereinafter "Sec. 501")

> Any funds necessary to be appropriated for full obligation of a fiscal year 1973 appropriation determined to have been unlawfully impounded by the executive branch of the United States Government in a civil action filed on or before June 30, 1974, are hereby appropriated out of any money in the Treasury not otherwise appropriated. Such appropriations shall remain available for obligation through the later of the day on which a final determination finding the impoundment legal is made or one year following the day on which the impoundment is found illegal.

STATEMENT OF THE CASE

This litigation arose out of the unprecedented policy adopted by the Nixon Administration in 1973 of refusing to continue statutory programs, and withholding, or "impounding," funds appropriated for grants to private recipients. A number of these impoundments occurred in programs administered by the department of HEW.[1]

The specific impoundment involved in this litigation was the FY 1973 appropriation for first year grants under the Community Mental Health Centers Act, as amended, 42 U.S.C. §§2688-2688d, 2688u. 4a. Because the statutory scheme of this grant program is important to the issue presented for review, it merits explanation.

This grant program funded community mental health centers ("CMHCs"), which are private, *i.e.*, non-federal organizations set up to provide mental health services in

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[1]These events are generally referred to in the legislative history of the Congressional Budget and Impoundment Control Act of 1974, Pub.L. 93-344, 31 U.S.C. §§1400 *et seq; see* 1974 *U.S. Code Cong. & Admin. News,* 3462.

the communities which they are designated to serve. The grant program contemplated a first year grant, followed by seven years of "continuation" grants. A grantee-CMHC received between 75% and 90% of the initial year's cost of the program by its Federal grant, and had to make up the remainder out of locally raised funds. 42 U.S.C. §§2688(b), 2688g(b).[2] In the succeeding seven years, the CMHC received generally decreasing percentages of "continuation" grants, between 35% and 80% from HEW, again with the CMHC making up the remainder. By the end of the eight year period the CMHC program was hopefully to be self-sustaining.

The CMHC impoundment did not attempt to cut off the "continuation" grants, which were essentially a federal commitment once the program had been funded by an initial year's grant. Rather, the impoundment withheld first year grants which would permit the initiation of new, additional community mental health center programs and organizations. Had the impoundment succeeded, the CMHC program would have run out of its federal funding after continuation grants for existing programs had been paid out.

The National Council of Community Mental Health Centers, ("NCCMHC") responded to this impoundment by seeking legal counsel. The NCCMHC, like its CMHC members, is a private organization, the only organization consisting of CMHC membership and devoted to CMHC purposes, and whose membership included most of the CMHCs throughout the country. Unable to pay legal fees at prevailing rates in the District of Columbia, the NCCMHC sought legal services on a charity basis from a number of sources but was unable to obtain representa-

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[2]The comparable present statutory provision is to be found in 42 U.S.C. §2689b. (c).

tion. Thereafter, Jerome S. Wagshal, Esq. (hereinafter "petitioner"), agreed to undertake the case on an arrangement modeled after that approved by this Court in *Central RR & Banking Co. v. Pettus*, 113 U.S. 116, 125 (1885), *i.e.*, the NCCMHC agreed to pay an hourly rated fee of $35, which was recognized as being substantially below petitioner's regular hourly charge, with this proviso (30a, n.5):

> It is understood that the above hourly rate and initial retainer is substantially less than would normally be charged for a matter of this nature. The proposed action will be filed as a class action on behalf of a class of community mental health centers, as well as the National Council. If, as a result of this litigation, a substantial benefit is conferred upon the plaintiff class, it is agreed that we will apply to the Court for an appropriate fee award from those class members benefiting therefrom. . . .

In addition to the NCCMHC, six individual CHMCs which had applied for grants were named as plaintiffs and class representatives, and this fee arrangement was confirmed with them by written agreement. After the case was filed, the NCCMHC widely publicized the nature of this fee arrangement by mailings to member and non-member CMHCs throughout the country. There is no evidence in the record of any dissent to this arrangement, until after the case was won and a fee application was made.

The remainder of this statement will summarize the results of the litigation on the merits, the fee award proceeding and decision in the district court, and the reversal of this fee award in the court of appeals.

A. The Decision On the Merits, *NCCMHC I.*

The case was filed near the close of FY 1973, and plaintiffs therefore sought a preliminary injunction, putting the impounded FY 1973 funds under judicial control. The purpose of this move was to avoid potential arguments (actually made in other cases filed later) that the funds had "lapsed" and were unavailable for obligation. The district court granted this preliminary injunction. 1a. Among the provisions of this Order were two which required that the "impounded" funds be recorded and treated as "expended:"

> (7) The defendants shall, not later than June 30, 1973, take all actions necessary duly to record the [impounded] sums . . . as expended pursuant to all laws . . . and retain said sums in an account earmarked as so expended in the name and credit of this Court.
>
> (8) The [impounded] sums . . . duly recorded as obligated and expended, shall remain so until further Order of this Court. . . .

In addition, the district court certified the case as a class action under Rules 23(b)(1) and (2). 1a.

Thereafter the matter proceeded to decision on cross motions for summary judgment and the result was a full victory for the plaintiff class. The district court dismissed the defendant government officials' "litany" regarding sovereign immunity and the "political question" defense (7a) and held that the matter was one of "statutory interpretation and constitutional construction." 8a. The court held

> . . . that Congress intended to require a full commitment of the fiscal 1973 appropriated funds by the end of the fiscal year.

10a. In determining Congressional intent, the court relied principally on the Medical Facilities Construction and Modernization Amendments of 1970, Publ.L.No. 91-296, Title VI, §601, 84 Stat. 353, 42 U.S.C.A. §§201 note and 2661 note (hereinafter referred to as "Sec. 601"). The court held that Sec. 601 "makes mandatory the spending of funds appropriated under the Act for fiscal 1973." 12a. The court buttressed this conclusion by a detailed review of the legislative history of this law, including its veto by the President because the funds "must be spent," and its passage after that veto. 13a. The purpose of the statute was shown to be "to prevent administration imposed . . . reductions . . . from applying to health programs." *Id.*

B. The District Court's Fee Award Decision, *NCCMHC II.*

As contemplated by the retainer agreement, petitioner applied for a fee award. The district court directed that notice be sent to all benefiting class members, which was done. The notice advised them that:

> 1. You have been awarded a grant subsequent to June 30, 1973 from fiscal 1973 funds released by this action, and are thus a member of the plaintiff class. *You will be bound by the judgment of this Court in the matter of the aforesaid application for an attorney's fee and will be required to pay your pro rata share of the fee.*
>
> 2. You may, but need not, enter an appearance for the hearing through counsel of your choice, and you will have all the rights provided by law, including those set forth in rule 23, Federal Rules of Civil Procedure. You may, but need not, through counsel of your choice, appear and be heard at the aforesaid hearing on October 31, 1974, at 10:00 a.m. You may, but need not, submit a written statement with

> or without aid of counsel to the Court for its consideration if you deem it appropriate. Any counsel desiring to appear must notify the clerk of court in writing by October 25, 1974. [Emphasis in original]

In another significant action, the district court directed the defendant Secretary of HEW to reserve a fund of some of the CMHC grant money which had not yet been withdrawn by the grantees or which had not yet been expended, and ordered a report of the amount so reserved. On the date the report was due, the Secretary failed to file the report, and instead moved "for Relief" from this order. As explained in more detail, *infra*, pp. 24-25, the defendant Secretary claimed that he could not reserve the funds because once the funds were obligated to grantee CMHCs (as all the funds had been), they could not be withdrawn for the court-reserved fund. In other words, the claim was that the grant money belonged to the grantees, *not the United States.*

Without ruling directly on this motion, the district court brushed it aside in its fee award decision. It held that:

> The record discloses that a portion of the money released by the litigation remains unused. The amount is more than sufficient to pay any reasonable attorney's fee in this situation and is still subject to the Court's control as a result of orders entered during the proceedings, even though the precise accounting as to this sum must await final auditing.

18a-19a. Prior to holding that it could award a fee from this sum, the district court held that "in its discretion" it would not exercise *in personam* jurisdiction over the class members to require them to pay a fee directly to petitioner, because it

> . . . determined that the representation of class members has been inadequate to support *in personam* judgments for attorney's fees against the class members.

18a. It found that the NCCMHC was an inadequate class representative even though it retained separate counsel for the fee proceedings. It based this conclusion on the fact that the NCCMHC "expressly disclaimed the ability to represent the class," had not received any of the released funds directly, and was claiming return of the money it had advanced petitioner at the reduced hourly rate. Since none of the CMHCs "originally named as plaintiffs and certified as representatives of the class has appeared by separate attorney in the portion of the case relating to Mr. Wagshal's fee applications," the court held that it was unable to enter an *in personam* judgment against the class members. In reaching this conclusion, the court drew a distinction between the *in personam* situation in which an "adequate representative" of the class had to appear, and the award of a fee from a fund, *i.e., in rem,* in which no such "adequate representative" was needed. 18a, n.2.

In deciding on the proper amount of a fee, the district court found that

> Mr. Wagshal worked energetically with full devotion to his client [sic] His papers on the merits were of quality and perceptive.

23a. Earlier the court stated, "Mr. Wagshal's clients were and are well satisfied with his professional efforts and as far as his work on the merits is concerned, it was of high quality." 21a. The court was however critical of petitioner's papers on his fee application.

The court reviewed in general terms the considerations leading to the determination regarding the amount of the fee award, but it made no specific findings regarding what

values if any it assigned to any particular factor. Instead, it indicated it was deciding on the basis of "a feel for these factors . . ., intangible and uncertain as they may be." 23a. Among the factors considered were these:

– "As a sole petitioner, [petitioner's] work was at many different gradations of professional responsibility and no flat hourly rate can reasonably be applied to his work as a whole." 22a.

– there was "no standard rate in this community even as between lawyers of comparable ability and responsibility." 23a.

– that the contingency factor, *i.e.*, the risk of fee recovery, would not be taken into account, merely payment for "useful time, plus a bonus for the result." 22a.

– finally, that petitioner would not be rewarded at the level of commercial charges in the private sector, but at some lower standard, because this case served the public interest. The court stated (24a):

> Those lawyers who choose the commendable course of serving the public interest rather than building a more remunerative commercial practice cannot expect the same financial awards as such practitioners sometimes achieve. . . . Awarding of fees is not intended to accomplish other social purposes, nor is it the function of the Court to attempt to equalize financial awards for all types of legal work. . . .

Using these standards, the court set a gross fee of $65,000 (a $50,000 basic fee plus $15,000 "for the result"). From this, the district court ordered petitioner to refund the $13,216.25 in advance fees paid by the NCCMHC, leaving petitioner a net of $51,783.75.

C. Reversal of the Fee Award by the Court of Appeals.

The court of appeals overturned this award, reaching this result by three conclusions. First the Court held that the "unexpended funds" from which the award was made "do not remain at the grantee's disposal if they have not been 'expended' by the end of the fiscal year," and that such "unexpended funds are thus in the safekeeping of the public treasury until their use is once again authorized." 32a. From this, the court determined that the United States is "the owner of the unexpended grant funds." The court concluded that since the money belonged to the United States, 28 U.S.C. §2412 barred an award from these funds.

Second, the court affirmed the district court's holding that it lacked jurisdiction to make an *in personam* award in petitioner's favor because "none of the individual class members ever made an appearance before the district court and there was no one else present to adequately represent their interests in the fee case. . . ." 35a. The court suggested that petitioner

> . . . should have provided in his retainer agreement for full payment of his fee or else he should have structured his pleadings in the district court in such a way as to inform the court and class members that he would be seeking an additional fee if he were successful on the merits.

Id. With these two rulings the court concluded, "Although we recognize that Wagshal has rendered a significant service on behalf of the community mental health centers we cannot award him a reasonable fee." 36a.

Finally, despite the conclusion that petitioner could have no award, the court of appeals nevertheless held that the district court had followed proper guidelines in

arriving at the award, and had made "an eminently reasonable award in this case." 36a.

* * *

The Court's attention is invited to the pendency of related cases in this Court and the court of appeals. In this Court, certiorari is being sought in *National Association of Regional Medical Programs, Inc., et al. v. Califano,* No. 76-1266 (filed March 11, 1977), hereinafter referred to as "the *NARMP* case."[3] The *NARMP* case, decided in the district court prior to the instant case, also deals with the award of a fee to the petitioner in this case, for services on behalf of a plaintiff class in another anti-impoundment litigation under a different HEW grant program. The same panel of the court of appeals which decided this case, and overturned the fee award, thereafter decided the *NARMP* case and also overturned the award made by the district court there.

Petitioner was the attorney representing the plaintiff classes in yet a third anti-impoundment action in which he was awarded a fee by the district court, *National Association for Mental Health, Inc. v. Weinberger,* 68 F.R.D. 387 (D.D.C. 1975). The appeal of that award is now pending in before the same court of appeals, *sub nom., National Association for Mental Health v. Califano,* Nos. 75-2212 and 2245 (D.C.Cir.), "the NAMH case," and briefing has not been completed.

Each of these three cases, the *NCCMHC* case (the instant case), the *NARMP* case, and the *NAMH* case,

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[3]The NARMP petition, No. 76-1266, should not be confused with *National Association of Regional Medical Programs, Inc., et al. v. Califano,* No. 76-1265, also filed March 11, 1977, referred to hereinafter as "the *NARMP* impoundment case." The *NARMP* impoundment case seeks review of lower court decisions permitting the Secretary of HEW to withhold over $1.8 million of the regional medical program appropriation from being granted to the plaintiff class, as distinguished from the *NARMP* case, *supra,* which concerns a reversal of a fee award, as in the instant case.

involve significantly similar issues, but there are distinguishing facts among them, and some distinguishing statutory provisions as well, principally the different statutory grant programs involved in each of the three cases. This Court may wish to await the disposition of the *NAMH* case by the court of appeals before making a determination regarding this petition and the one in the *NARMP* case.

Federal jurisdiction was invoked in the district court in the original proceeding under 28 U.S.C. §§1331, 1361, and 5 U.S.C. §§701-6.

REASONS FOR GRANTING THE WRIT

Review and reversal of the court of appeals' decision is called for, for many of the same reasons as those stated in the *NARMP* petition, No. 76-1266, though there are additional reasons calling for review here.[4] This was the first decision by the court of appeals in this trilogy of fee cases involving the petitioner, Jerome S. Wagshal. The *NARMP* decision followed this one, and relied heavily on it.

Thus this was the first decision by which the court of appeals created an exception to the "common benefit" rule, that an attorney representing a plaintiff class should be awarded a fee from the fund he obtains for the class or from the class members if he benefits them. This Court

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[4]Reference will be made to the *NARMP* petition where appropriate, but the discussion in that petition will be repeated herein to the extent necessary to make this petition a complete document in itself. Petitioner notes that among the additional matters presented by this petition are (i) the discussion regarding the carry over of CMHC grants, pp. 24-25 *infra*, and (ii) the issue of the standards for determining the amount of a fee, pp. 31-32 *infra*. Another distinguishing factor is the opposition of some class members to a fee award in this case, pp. 29-30, *infra*, whereas the class members in the NARMP case fully supported petitioner's application.

stated in *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 258 (1975), "That rule has been consistently followed." Now however, a single three-judge division of the court of appeals has, by two related decisions, carved out a major exception in this heretofore "consistently followed" rule. The creation of such an exception has serious, indeed, grave consequences in at least three areas of concern to this Court. There is the selecting out of a class of litigants—recipients of federal grants for medical and scientific work—who will as a practical matter be denied access to the judicial system unless the court of appeals decisions are reversed, whereas other groups of potential litigants will continue to be able to obtain legal representation under the "common benefit" principle. There is the extension of the application of 28 U.S.C. §2412 so that it serves as a shield for federal officials who unlawfully withhold grant funds from statutorily intended recipients. There is the diminution of the equitable powers of the federal judiciary, which this Court has heretofore defined far more broadly than as applied by the court of appeals. Related to this is the constitutional question of whether plaintiff classes who are benefited by successful litigation can invoke the shield of due process to avoid payment of an equitable fee merely by ignoring the notice of the fee application, and thereby leaving the class without "adequate representation" in the fee proceeding.

All these issues flow out of a fact situation which, in its essentials, consists of this: An attorney representing a class of persons claiming entitlement to federal grant funds obtained the release of over $52 million for the plaintiff class, plus other benefits. Nevertheless the court of appeals held that there was no point in the process of the release of these funds pursuant to judicial order at which the court which released the funds could order an equitable fee to be paid to the attorney, either from the

money released to the class or by the class members. As the decision now stands, over $52 million flows from the treasury to private hands pursuant to court order, and the courts cannot compensate the attorney who successfully represented the class.

This result, and the similar one reached in the *NARMP* case, constitutes an unprecedented exception to the heretofore "consistently followed" rule endorsing "common benefit" fee awards. This result simply does not square with the consistent line of decisions of this Court represented by *Trustees v. Greenough*, 105 U.S. 527 (1882), *Central RR & Banking Co. v. Pettus, supra; Sprague v. Ticonic National Bank*, 307 U.S. 161 (1939); *Mills v. Electric Auto-Lite Co.*, 396 U.S. 161 (1970); and *Hall v. Cole*, 412 U.S. 1 (1973).

One of the clearest statements of the principle established by these cases was made by this Court in *Sprague, supra*, 307 U.S. at 167, that "when . . . a fund is for all practical purposes created for the benefit of others, the formalities of the litigation . . . hardly touch the power of equity in doing justice as between a party and the beneficiaries of his litigation." In a substantial line of cases, federal courts have applied this principle to award attorneys' fees in cases in which persons have sued successfully to obtain funds under the control of government officials. *See, e.g., United States v. Equitable Trust Co.*, 283 U.S. 738 (1931); *Houston v. Ormes*, 252 U.S. 469 (1920); *Dickinson v. Stiles*, 246 U.S. 631 (1918) (Holmes, J.); *National Treasury Employees Union v. Nixon*, 172 U.S.App.D.C. 217, 521 F.2d 317 (1975); *Lafferty v. Humphrey*, 101 U.S.App.D.C. 222, 248 F.2d 82, *cert. den., sub nom., Benton County v. Lafferty*, 355 U.S. 869 (1957); *Honda v. Mitchell*, 136 U.S. App.D.C. 22, 419 F.2d 1204 (1969); *Freeman v. Ryan*, 133 U.S. App. D.C. 1, 408 F.2d 1204 (1968); *Celebrezze v. Sparks*,

342 F.2d 286 (5 Cir. 1965); *Folsom v. McDonald*, 237 F.2d 280 (4 Cir. 1946); and *United Federation of Postal Clerks v. United States*, 61 F.R.D. 13 (D.D.C. 1973). Each of the barriers to a fee award raised by the court of appeals in this case could have been raised in some form in those cases as well, and many were. Yet in those cases, statutorily intended recipients ranging from federal employees *(National Treasury Employees [illegible]ion)*, to counties of a state *(Lafferty)* to postal clerks *(United Federation of Postal Clerks)* were able to obtain legal representation by the equitable mechanism of the "common benefit" fee award, while in this case community mental health centers cannot do so, and in the *NARMP* litigation, regional medical programs could not do so, according to the court of appeals.

To arrive at this inconsistent result, the court of appeals had to make a number of subsidiary holdings which in themselves merit review by this Court. Since the court of appeals organized these holdings under the *in rem—in personam* dichotomy, they will be discussed here in that form, although petitioner does not concede that this is a significant distinction for the issues presented. See p. 28 *infra*.

A.

THE DETERMINATION BY THE COURT OF APPEALS THAT THE FUNDS TO BE USED FOR FEE PAYMENT BELONGED TO THE UNITED STATES WAS INCONSISTENT WITH THE CASE ON THE MERITS, IGNORED CONTROLLING STATUTES, AND IMPROPERLY REVERSED THE DISTRICT COURT ON A FACTUAL FINDING

In deciding that the district court's award had to be reversed, the court of appeals held that the money from which the award would be paid belonged to the United States, and therefore was insulated from being used to pay

a fee award by 28 U.S.C. §2412. In arriving at this conclusion the court of appeals focused on the HEW's internal procedures in handling the eight-year CMHC grant program, describing them as follows (29a):

> Under normal operating procedures, the initial grant is made for the estimated cost of the first year of the project. Should this cost estimate be high in relation to the expenses incurred by the grantee in the first year, the surplus or unexpended funds are included in the computations for future grants. An estimate of the unexpended balances in all of the grantees' accounts at the end of a current budget period is made based on historical averages and then sufficient funds are appropriated to meet the next year's estimated grants. . . . Should the grantee seek a continuation award for the next year, HEW computes the amount of the grant on the basis of the estimated cost of the program for that year less the grantee's matching funds and the unexpended balance remaining from the previous year's grant. (fn. omitted.)

The court of appeals assumed that the award would be made from these "unexpended" funds, and based on this, concluded that they belonged to the United States; this was the core of its decision (32a):

> We find that the manner of disposition of these unexpended funds is conclusive evidence of their true ownership. As noted previously, these unexpended funds are one factor taken into account in determining the amount of future grants which each grantee will receive. *These funds do not remain at the grantee's disposal if they have not been "expended" by the end of the fiscal year.* It is only through a subsequent continuation grant approved by HEW that a grantee can again reach these unexpended funds which it failed to use the previous year. These unexpended funds are thus in

> the safekeeping of the public treasury until their use is once again authorized. . . . An award of attorney's fees from these funds therefore would be an award against the United States and contrary to 28 U.S.C. §2412. . . .(Emphasis added)

These statements, which led the court to disgard the "common benefit" principle, are riddled with both legal and factual error. They overlook three controlling statutes, overturn the district court on a factual conclusion which was based on undisputed evidence of record, and place the court in a position on relying erroneously on an HEW regulation to support its decision.

1. The Court of Appeals Decision Ignores Three Controlling Statutes

The basic inconsistency in this case is that the district court decided the merits of this case on the basis that the Executive had to spend the funds appropriated for the CMHCs, without "administration imposed . . . reductions. 13a. Previously, by the preliminary injunction, the court had ordered the funds to be placed in an account in its name, and treated as "expended pursuant to all laws. . . ." 2a. In short, the CMHCs as a class were held to be rightful recipients of these funds; the court held that they could not be retained by the federal government. Yet, the court of appeals' decision holds that the United States "is the owner of the unexpended grant funds." 34a. If the district court's decision on the merits was correct, there were no "unexpended" grant funds in this case, and, in any event, whether expended or unexpended, there are no grant funds which the United States was entitled to retain as an "owner."

The court of appeals' error stemmed from its failure to consider or give effect to three statutes which mandated

the full release of these funds.[5] The court of appeals focused on the microcosm how surplus funds in the account of an individual grantee-CMHC were treated in HEW accounting procedures, rather than the more relevent, bigger picture, that the funds had to be released to the class as a whole. Petitioner's equitable claim for a "common benefit" fee award was of course against the benefiting class as a whole. And the three statutes ignored by the court of appeals were likewise directed at release of the funds for the benefit of the class as a whole.

The first of these three statutes is Sec. 601, *supra,* which was the principal statutory basis for the decision on the merits. 12a-13a. It would be difficult to conceive of a legislative history which more conclusively establishes the mandatory requirement for release of the CMHC grant funds to the plaintiff class than that reviewed by the district court, including the passage of the statute over Presidential veto, in order "to prevent administration imposed . . . reductions . . . from applying to health programs." 13a.

The second statute is 31 U.S.C. §665b, which is directly contrary to the court of appeals' key conclusion. The court held that if the grant funds "have not been 'expended' by the end of the fiscal year," they go back "in the safekeeping of the public treasury until their use is once again authorized." 32a. But §665b., a statute passed specifically to prevent such accounting treatment by the Executive, provides that, "[A]ny provision of law which requires unexpended funds to return to the general fund of the Treasury at the end of the fiscal year shall

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[5]This is the third case being brought before this Court in which the same court of appeals has ignored these three statutes. The other two are the *NARMP* petitions. See Petition No. 76-1265, pp. 11-15; petition No. 76-1266, pp. 27-28, which review these three statutes.

not be held to affect the status of any lawsuit or right of action involving the right to those funds." How could there be a more direct answer to the appellate court's conclusion, and how could such a direct answer be properly overlooked? This statute was intended to preserve the rights of "all parties" who might be affected by failure to obligate and expend the grant funds. See S.Rep. No. 93-414, pp. 5-6.

The third statute, Sec. 501, *supra*, addressed the same "lapse" issue in yet another, but no less dispositive way. This statute, passed when the Administration continued to make the "lapse" argument in anti-impoundment cases filed after the close of FY 1973, reappropriated any funds "necessary to be appropriated for full obligation of a fiscal year 1973 appropriation determined to have been unlawfully impounded. . . ." Particularly significant is the statement in S.Rep. No. 93-614 that

> . . . this provision appropriates these impounded sums and *makes them fully available for obligation pursuant to court order*. . . .

In connection with this statute, it is particularly important to note that it requires a judicial determination of unlawful impoundment as a prerequisite for the reappropriation. Twice, in attorney's fee cases, this Court has reasoned that Congress would not have anticipated civil litigation in a statute and at the same time forbid those bringing the litigation from being able to pay their attorney. *Hall v. Cole, supra,* 412 U.S. at 13-14; *Dickinson v. Stiles, supra,* 246 U.S. at 632-33. Yet the court of appeals in this case not only ignored this logic, but even the statute which underlies it.

* * *

The court of appeals attempted to distinguish *Lafferty v. Humphrey, supra,* a case which it impliedly recognized as having similar facts, on the ground that, according to

the court of appeals, the legislation in *Lafferty* "specifically directed the executive officials 'to disburse the balances left at the end of each year,' " whereas the court of appeals believed this was not the case with respect to the CMHC appropriation. 34a. But the three statutes reviewed above, all of which were ignored by the court, specifically require the disbursal of these year-end balances, and put this case on all fours with *Lafferty*.

2. The Court of Appeals Set Aside Factual Findings By The District Court That Were Not Clearly Erroneous and Which Were Established By Defendants' Admissions

As previously noted the court of appeals' reversal turned on the conclusion that the funds from which the fee was to be paid were "unexpended" funds which "do not remain at the grantee's disposal if they have not been 'expended' by the end of the fiscal year." This was essentially a factual conclusion which rode roughshod over uncontradicted evidence in the record which established the contrary. The district court had incidentally, stated that the fee was to be drawn, not from "unexpended" funds, but from "a portion of the money released by the litigation [which] remains *unused.*" 18a. (Emphasis added) And the court held that payment of this fee will "reduce the fund by the amount of the fee awarded. . . ." 20a. The court of appeals, ignored these findings, in holding that the fee award would be a charge on the treasury rather than the class members. It also ignored the fact that all the impounded funds had been marked as "expended" since the entry of the preliminary injunction. 2a.

Even if the fee were to be drawn from "unexpended" funds remaining after the close of the grantee's initial year, rather than "unused" funds, it is difficult to understand how the court of appeals could have

concluded that such "unexpended" funds do not remain at the grantee's disposal at the end of the fiscal year. The court indicated that conclusion was based on an affidavit submitted in the district court by an HEW official, John P. Spain. 29a. But that affidavit states the contrary, and, indeed, was submitted to prove the contrary. It was submitted in support of defendants' motion for "relief" from the district court's order requiring reservation of some of the grant funds, and its purpose was to establish that the grant funds had been irrevocably granted to the grantee-CMHCs, and could not be reserved, even in part, for fee payment. The affidavit stated that year-end balances do *not* return to the "safekeeping of the public treasury" at the end of a fiscal year; it stated this in precise and specific terms:

> 10. Even if the unexpended balances in the grantees' account could be determined, *there is no authority under which the Department of Health, Education, and Welfare could "recover" these unexpended balances* unless: (a) the grantees consent to such recovery; or, (b) the grantees have failed in a material way to comply with the terms and conditions of the grant award. These limitations arise from the fact that *grantees have an entitlement to the funds awarded for the first budget period until such funds are expended or until the end of the project period (normally an eight year period),* whichever occurs first . . . Thus there is no authority under which the Department of Health, Education, and Welfare can unilaterally recover the unexpended balances of the grants made pursuant to the Court Order of August 3, 1973 [the final judgment in NCCMHC I]. (Emphasis added.)

Attached to the Spain affidavit as Exhibit "E," was a portion of an HEW manual which stated that, "Funds surplus to the grantee's needs in one budget period are

available for its use in the next." Par. 1-85-10. Two pages later, the same document stated:

> If approved for support, a grant is awarded in an amount estimated to be the necessary Federal share of costs for the first budget period [i.e., the first year]. *These funds are available for use by the grantee, however for the entire [eight year] project period.* (Emphasis added.)

By ignoring this evidence, the court of appeals violated Rule 52, Fed.R.Civ.P., in reversing the district court on its factual findings which were not clearly erroneous. What was clearly erroneous was the court of appeals' reversal.

3. The Court of Appeals Improperly Relied on An HEW Regulation

To support its conclusion that the district court's award had to be overturned, the court of appeals cited an HEW regulation which permitted payment of legal fees as an allowable overhead grant expense, except that "the prosecution of claims against the Government" were specified as unallowable. The error of relying on this regulation is that such reliance equates the defendant government officials who were found to have violated the law by their impoundment with "the Government." This violates the fundamental constitutional tenet that when public officials violate the law they are not "the Government," and thus not shielded by sovereign immunity. *Marbury v. Madison,* 5 U.S. (1 Cranch) 138, 168 (1803). In the case on the merits, the defendants' attempt to use the sovereign immunity defense and their claim they were "the Government," was rejected with the suggestion that defendants replace their "litany" with "a modicum of common sense." 7A. Yet in the court of appeals, the same argument, that was brushed aside on the merits was made controlling so as to bar a fee award.

The court of appeals holding equating the defendant government officials with "the Government" was also directly contrary to *Houston v. Ormes, supra,* 252 U.S. at 472-4, a case which is in all significant respects identical to this one except it approved the fee award at issue.

As interpreted by the court of appeals, HEW's regulation allows its officials to violate the very laws under which the regulations were issued, by prohibiting those victimized by the violations of law from having the means to obtain legal representation to prevent such violations. Such an interpretation is clearly out of harmony with the underlying statutes and therefore invalid. *Dixon v. United States,* 381 U.S. 68, 74 (1965).

B.

THE COURT OF APPEALS' DECISION IMPOSED A NOVEL AND IMPROPER REQUIREMENT FOR THE EXERCISE OF IN PERSONAM JURISDICTION IN A FEE AWARD PROCEEDING

Assuming *arguendo* that the district court could not exercise *in rem* jurisdiction, the lower courts erred in holding that the district court could not exercise *in personam* jurisdiction.[6] This error was two-sided: As a matter of law, the lower courts incorrectly imposed a requirement of "adequate representation" of the class in the fee proceeding, and, as a matter of fact, even if there were such a requirement, it was amply met in this case.

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[6]It may be questioned as to why the district court reached the *in personam* issue, since it held a few could be awarded from the grant funds. Several CMHCs wrote the court in response to the notice of fee application that they would be more seriously affected by having to pay a fee directly to petitioner from non-grant funds, since such funds were needed as matching funds for their federal grants, and each dollar of non-grant funds enabled them to receive several dollars of grant funds. Petitioner consistently advocated payment from grant funds as the better choice.

1. As a Matter of Law, Due Process Should Require Only Adequate Notice And An Opportunity to Appear, As a Prerequisite of Jurisdiction In A Fee Award Proceeding Under the "Common Benefit" Rule

The requirement imposed by the lower courts, that the plaintiff class be "adequately represented" by separate counsel in the fee award proceeding (16a-17a; 35a), runs counter to this Court's decision in *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950). In *Mullane*, this Court held that for a *defendant* class, as distinguished from a *plaintiff* class, notice "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections," were the conditions by which "the constitutional requirements are satisfied." 339 U.S. at 314-315. Of course collusive arrangements, such as were present in *Hansberry v. Lee*, 311 U.S. 32 (1940), are not at issue in this case.

Rather, the issue here is whether in a fee award proceeding, a proceeding "supplemental" to the adjudication on the merits (*Sprague, supra*, 307 U.S. at 170), the plaintiff class must not only be given notice of the fee application and an *opportunity* to appear, but must in fact appear by separate counsel and oppose[7] the award in order for the district court to have equitable jurisdiction

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[7]In the *NARMP* litigation, this same court assumed that it was "obviously . . . not in the best interests of the individual class members" for the class representatives to support the award of a fee. See Petition in No. 76-1266 at 57A. This of course ignores the long-range effect of such an opposition on the ability of the class to obtain future representation, or the basic equities which the class members may believe the attorney is entitled to, as a result of his efforts on their behalf, and which benefited them.

to award a "common benefit" fee to the class attorney. This issue is one which carries with it important implications for the conduct of class actions generally, for two reasons:

First, as a practical matter, if, after receiving the benefits of the litigation, and after receiving adequate notice of the fee application, the class members simply choose to ignore the court's notice, and not appear by separate counsel to oppose the award, they thereby escape the jurisdiction of the court, and divest it of its equitable powers to award a "common benefit" fee—under the rule as applied by the lower courts. (Here the district court invited this result by advising the class members that they "need not" appear, see p. 9, *supra*.

Second, in *Mullane*, this Court held that the *in personam-in rem* dichotomy was not significant when it came to establishing constitutional standards. 307 U.S. at 312-13. In other words, if adequate representation is held to be a constitutional requirement for an equitable fee proceeding, it would be as much a requirement where the court had control of a fund as where it could only award a fee payable directly by the class members. (Note that the district court held otherwise. See 18a, n.2.)

In effect therefore, the decisions of the lower courts have imposed a requirement that after an attorney confers benefits on a class, he may nevertheless not receive a judicial fee award unless he then can find a way to induce the class members, or some of them, to enter into a supplemental adversary litigation with him. Like Androcoles, he must do battle against those he has previously benefited. Only here, if the lion refuses the battle, Androcles is the loser. Such a system is obviously calculated the chill all class representation. Twice this Court has indicated that fees under the common benefit principle can and should be paid directly by the parties

enjoying the benefit of the litigation, if the fee cannot be paid from the funds recovered. *Alyeska, supra,* 421 U.S. at 257; *Trustees v. Greenough, supra,* 105 U.S. at 532. The lower court decisions in this case effectively overturn these decisions.

In considering this issue, it is important to note that the constitutional standard laid down by this Court in *Mullane,* that notice and an *opportunity* to appear are enough, was expressed in the context of the trial of merits of the litigation. It is *a fortiori* even more applicable to a supplemental proceeding for the award of an equitable fee after the class has received the benefits of the suit.

2. As a Matter of Fact, The Record Establishes That The Plaintiff Class Was Separately Represented In The Fee Proceeding

In deciding the adequate representation issue, the lower courts simply ignored uncontroverted facts of record which established the adequate representation of the plaintiff class.

At the fee award hearing held after notice to all class members, Lynn R. Coleman, the District of Columbia partner of the prominent Houston and D.C. firm of Vinson, Elkins, Searls, Connally & Smith, appeared as counsel for the Puerto Rican CMHCs. He advised the court that by the standards of this district a fee in the range of $250,000 to $500,000 would be reasonable for the services rendered by petitioner. A similar recommendation was made by a written appearance filed by the County Attorney for Fairfax, Virginia, who also was obviously familiar with standards in the D.C. area. The court of appeals' finding (35a) that "none of the individual class members ever made an appearance before the district court," is simply incorrect. In addition, many other CMHCs replied in writing to the notice of fee application, a number of them opposing it.

The appellate decision errs yet again when it states that the class members were only informally advised by the NCCMHC of the retainer arrangement and that, "These benefiting class members were not parties to the retainer agreement. . . ." 30A. The fact, established without dispute in the record, is that six individual CMHCs were named plaintiffs in this case and served as class representatives. *Each of the six was specifically informed of, and agreed to the retainer arrangement contemplating a fee award if the case was successful.* Of these six, four received awards totaling over $3.3 million, or 6% of the amount released. These CMHCs clearly had a sufficiently substantial interest to serve as class representatives and protect the interests of their fellow-class members. In addition, a fifth named plaintiff, received a $806,923 award.

Finally, the conclusion that the NCCMHC, which had been the lead plaintiff in the case in chief, did "not represent the interests of the individual class members in this fee application case" (35a.) is plainly refuted by the record which shows that in both lower courts the NCCMHC's principal effort, by separate counsel, was to avoid a direct assessment against the CMHCs[8] and to hold down the amount of the award if direct assessment were made. For example, the court of appeals, the NCCMHC filed a "Response" on April 11, 1975 which sought to prevent "recourse to the locally raised funds of [NCCMHC] members." Of course, the membership of the NCCMHC includes many benefiting CMHCs. *NCCMHC II,* 387 F.Supp. at 993-4, n.1, 17a. It should be noted that there are many more CMHCs in existence than received grants as a result of this litigation. As a practical matter notice to all potential grantees would not have

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[8] The NCCMHC took this position, not in its own interest, but to protect the locally raised funds of the CMHC class members. See note 6, p. 26, *supra.*

been possible. Only after the case was concluded and the grantees selected could notice be given; before that, the publications by the NCCMHC generally advised the CMHCs throughout the country of the action and fee arrangement. Accordingly, the suggestion that petitioner should have included a statement in the complaint, filed on behalf of the plaintiffs and not himself, of his personal intention to claim a fee—a procedure never before suggested by any court in any case—would not have made any practical difference.

C.

THIS IS AN APPROPRIATE CASE FOR THIS COURT TO SET STANDARDS FOR THE AWARD OF FEES UNDER THE "COMMON BENEFIT" PRINCIPLE

If this Court undertakes to review and reverse court of appeals' decision, so as to permit an award, it will then be thrust into the question of the proper standards for determining the amount of a "common benefit" fee. Although this determination is normally left to the discretion of the trial court, appellate tribunals have not hesitated to modify awards where they have deemed such action appropriate. *Alpine Pharmacy, Inc. v. Pfizer & Co., Inc.*, 481 F.2d 1045, 1050 (2 Cir.), *cert. denied*, 414 U.S. 1094 (1973).

Review of the standards applied by the lower courts in this case is particularly called for for several reasons:

First, the district court, for the first time that petitioner is aware of, laid down a rule that an attorney serving the public interest by successfully bringing a class action such as the instant litigation, "cannot expect the same financial awards" as achieved by those who successfully devote themselves to "building a more remunerative commercial practice. . . ." 24a. In other words, attorneys serving the public interest who obtain

over $52 million for the class they represent, cannot expect as much compensation as an attorney who obtains $52 million for a private interest. A doctrine more calculated to deny effective representation to important public interest causes cannot be conceived, unless it is, as here, to award no fee at all.

Second, the district court essentially awarded a fee based on its "feel" of the case (23a.), rather than any expressed evaluation of the factors to which it alluded.

Third, although it did not have to reach this issue, the court of appeals went out of its way to affirm the district court's actions in this regard. Accordingly, if the determination is made that petitioner can be awarded a fee, the question of the amount of the fee becomes ripe for review by this Court.

The district court's approach in this case, of setting a fee by "feel" is basically inconsistent with the approach pioneered by the Third Circuit in *Lindy Bros. Builders, Inc. v. American R. & S. San. Corp.*, 487 F.2d 161 (3 Cir. 1973), decision after remand, 540 F.2d 102 (3 Cir. en banc 1976). The *Lindy Bros.* formula for fee calculation has been adopted in other circuits, including at least one decision in the District of Columbia. See, *e.g.*, *National Treasury Employees Union v. Nixon, supra; City of Detroit v. Grinnel Corp.*, 496 F.2d 448 (2 Cir. 1974). Yet it was flatly rejected in this case.

Unless this Court provides standards in this area, these varying determinations will continue a situation in which "there are nearly as many notations of what is reasonable [for a fee award] as there are judges." *Alpine Pharmacy, Inc. v. Pfizer & Co., Inc., supra*, 481 F.2d at 1051. Only this court can provide uniformity in this area.

CONCLUSION

For the reasons stated herein, petitioner prays that this petition be granted, and a Writ of Certiorari issue to review the judgment of the court of appeals.

Respectfully submitted,

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Washington, D.C. 20036
Petitioner Pro Se.

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1223-73

NATIONAL COUNCIL OF COMMUNITY MENTAL HEALTH CENTERS, INC., ET AL., on their own behalf of all others similarly situated,

Plaintiffs,

v.

CASPAR W. WEINBERGER, ET AL.,

Defendants.

ORDER

The Court having entered its Findings of Fact and Conclusions of Law this 28th day of June, 1973, it is hereby

ORDERED:

(1) This matter is certified as a class action under Rules 23(b)(1)(A), 23(b)(1)(B) and 23(b)(2), Fed. R. Civ. P. to include all parties who have submitted applications for initial grants for community mental health center staffing or children's services in fiscal year 1973 under Parts B or F of the Community Mental Health Centers Act, as amended, 42 U.S.C. §§2681, *et seq.*, (hereinafter "the Act").

(2) Plaintiffs' motion for preliminary injunction shall be and hereby is granted,

(3) Defendants Weinberger, Brown and Ash, and their officers, agents and employees, are restrained and enjoined from carrying out defendant Brown's directive of February 23, 1973.

(4) Defendants Weinberger, Brown and Ash, and their officers, agents and employees, are enjoined and man-

dated to take all actions necessary to review and process all applications pending for community mental health center staffing and children's services grants, and, without delay, award grants by Notice to Grant or other lawful means to all applicants found to be qualified pursuant to the same lawful eligibility requirements on the same basis as they were applied by the defendants prior to February 23, 1973. Final review and processing of all pending applications shall be completed no later than June 30, 1973.

(5) Defendants shall take all actions, including issuing Notices to Grant, necessary to obligate funds under the Act for community mental health center staffing and children's services grants no later than June 30, 1973, for all duly approved pending applications.

(6) The defendants shall, not later than June 30, 1973, take all actions necessary duly to record as an obligation of the United States pursuant to 31 U.S.C. §200 the amount representing the differential between the $165,100,000 appropriated for community mental health center staffing grants under the Act and the sum obligated by June 30, 1973, for continuation staffing costs, and the amount representing the difference between the $20,000,000 appropriated for children's services costs.

(7) The defendants shall, not later than June 30, 1973, take all actions necessary duly to record the sums described in paragraph (6), above, as expended pursuant to all laws, including 31 U.S.C. §200, and retain said sums in an account earmarked as so expended in the name and credit of this Court.

(8) The sums described in paragraph (6), above, and duly recorded as obligated and expended, shall remain so until further Order of this Court and resolution of

this case on its merits and the defendants shall take all actions necessary to achieve that result.

(9) All parties shall submit any additional papers for the Court's consideration of this matter on the merits by July 15, 1973, and the Court will then enter a Final Order viewing the case as one presented on cross-motions for summary judgment on the record and pleadings.

(10) Since no funds will leave the treasury of the United States, plaintiffs need only post a cash or surety bond of $250.00

/s/ Gerhard A. Gesell

UNITED STATES DISTRICT JUDGE

June 28, 1973.

NATIONAL COUNCIL OF COMMUNITY MENTAL HEALTH CENTERS, INC., et al., on behalf of themselves and others similarly situated, Plaintiffs,

v.

Caspar WEINBERGER et al.,
Defendants.

Civ. A. No. 1223-73.

United States District Court,
District of Columbia.

Aug. 3, 1973.

* * *

Jerome S. Wagshal, Pearce & Wagshal, Washington, D.C., for plaintiffs.

Kenneth A. Rutherford, Atty., Dept. of Justice, Washington, D.C., for defendants.

MEMORANDUM OPINION

GESELL, District Judge.

Plaintiffs as a class bring this action seeking an order requiring defendants to review, approve, and obligate to the plaintiffs funds in the amount of $52,050,000 for first-year grants for staffing of community mental health centers and for construction and staffing of mental health treatment centers for children under the Community Mental Health Centers Act, as amended, 42 U.S.C. §§2688-2688d, 2688u (hereinafter referred to as the Act). The class, certified by the Court under Rule 23, Fed.R.Civ.P., consists of all those having applied for first-year grants under these provisions of the Act.

Defendants have moved to dismiss this action on the grounds that the Court lacks jurisdiction over the subject

matter of this action; that plaintiffs have failed to join an indispensible party; that there is no justiciable case or controversy presented by this action; and that the complaint fails to state a claim upon which relief can be granted. In addition, plaintiffs and defendants have each cross-moved for summary judgment as a matter of law. The issues have been thoroughly briefed and the underlying facts are not in dispute.

Administration of the Act lies with the Secretary of the Department of Health, Education and Welfare (HEW). The Regional Offices of HEW review applications and then send them to the National Advisory Mental Health Council for approval. If that approval is obtained, each of the ten HEW Regional Directors then makes the final determination on which of the applications as recommended favorably by the National Advisory Mental Health Council will be finally approved for award, the amount to be awarded, and the priority order for payment. Accordingly, although a Regional Health Director may not award a grant that has not been recommended for approval by the National Advisory Mental Health Council, a favorable recommendation by the National Advisory Mental Health Council neither constitutes effective approval of a grant application nor obligates the respective Regional Health Directors to award a grant to the applicant.

On February 23, 1973, the Director of the National Institute of Mental Health issued a directive to the HEW Associate Regional Directors for Mental Health which in pertinent part:

(1) Noted that because of the revised 1973 budget "no new staffing grants will be awarded in 1973."

(2) Noted that "[a]ll activities of the Regional Offices pertaining to the development of additional staffing grant applications should be discontinued since they cannot be funded."

(3) Discouraged potential applicants for grants from making application: assistance in the form of "staffing application kits" was directed "not [to] be distributed to potential applicants;" applications received and not yet reviewed were not to be "site visited or reviewed for funding but should be acknowledged to the applicant in a letter explaining the reason the application will not be reviewed . . . ;" staffing grant applications already reviewed by the Regional Office were ordered "not [to] be duplicated or presented to the National Advisory Mental Health Council."

As of February, 1973, a total of 77 grant applications had been recommended for approval by the National Advisory Mental Health Council, in total sum of $39,026,565, and many other applications had been received and were under review, or had been initially approved by Regional Directors. After February 23, 1973, defendants ceased procuring and developing first-year grant applications by members of the plaintiff class and applications have not been processed or developed. No action was taken by defendants after February 23, 1973, to obligate or expend funds for the 77 approved grant applications, or for any other first-year grant applications in fiscal 1973, although the defendants made available funds in fiscal 1973 to applicants to meet the continuation costs of previously funded grants.

By continuing resolution, for fiscal year 1973 Congress has appropriated for obligation and expenditure the sums of $165,000,000 for Community Mental Health Center staffing and $20,000,000 for Mental Health for Children.[1] Although approximately $52,050,000 of this appropriation is available for funding first-year grant

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[1]86 Stat. 402 (1972), as amended, 86 Stat. 563, 746, 1204 (1972) and 87 Stat. 7 (1973); H.R. 15417, 92d Cong., 2d Sess. (passed June 15, 1972).

applications, none of this amount has been obligated or expended as of the date of suit. On June 28, 1973, the Court entered a preliminary injunction ordering defendants to review and fully process by normal criteria all pending applications, and to take measures necessary under 31 U.S.C. §200 to prevent all unobligated and unspent funds for the first-year grant programs from lapsing at the end of fiscal 1973, and thus returning to the general treasury fund pursuant to 31 U.S.C. §701(a)(2).

Before turning to the merits, the issues raised by defendants' motion to dismiss must be considered.

The defendant Government officials raise standard objections so typical in these cases and many other categories of current Government litigation. They plead sovereign immunity and say that citizens directly affected as potential beneficiaries of appropriations have no standing to complain because these appropriation matters raise transcendent political issues which a Federal Court should not venture to resolve.

It is time this litany was displaced by a modicum of common sense. When Congress directs that money be spent and the President, as Chief Executive, declines to permit the spending, the resulting conflict is not political. The President, after being advised, believes he has the power because of economic conditions and other reasons to refuse to spend at his discretion. Yet he is charged by the Constitution faithfully to execute the laws. If the President is in all good faith mistaken as to the meaning and effect of the law or his inherent power under the Constitution, what is more normal and consistent with our American system of government than for the courts to interpret the law and thus resolve the apparent conflict one way or the other.

This dispute can readily be resolved by the customary exercise of judicial power, and therefore is not a nonjusticiable political question. Powell v. McCormack, 395 U.S. 486, 89 S.Ct. 1944, 23 L.Ed.2d 491 (1969); Baker v. Carr, 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962). Furthermore, any affirmative order of this Court would be premised on a determination that official action by the defendants in refusing to spend is beyond their statutory or constitutional powers. This would go no further than to require the spending of funds already appropriated by Congress to achieve the declared purposes of the Act. Accordingly, there can be no effective assertion of sovereign immunity and the defendants' actions are reviewable by the courts. *See* Dugan v. Rank, 372 U.S. 609, 83 S.Ct. 999, 10 L.Ed.2d 15 (1963); Largon v. Domestic & Foreign Corp., 337 U.S. 682, 69 S.Ct. 1457, 93 L.Ed. 1628 (1949); Scanwell Laboratories, Inc. v. Shaffner, 137 U.S.App.D.C. 371, 424 F.2d 859 (1970). The Court has jurisdiction pursuant to 5 U.S.C. §§701-706, and 28 U.S.C. §§1331 and 1361.

An issue of statutory interpretation and constitutional construction is presented. To say that the Constitution forecloses judicial scrutiny in these circumstances is to urge that the Executive alone can decide what is best and what the law requires. To say that persons immediately and seriously affected by failure to commit funds, authorized by the Legislature cannot go to court is to ignore the democratic base of our society. Indeed, it is only when the three equal and coordinate branches of government function that a stable government can be assured. *Cf.* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 2 L.Ed. 60 (1803). The rule of law dictates calm judicial determination rather than political confrontation. Such confrontations are either resolved by naked

power utilized in many irrelevant ways, or the issue stalemates. We are a government of law, not men, and the law must be determined and upheld. This is the neverending process by which the Constitution is molded to the exigencies of the times and will be made rational in this and succeeding centuries. These cases should move to higher courts for prompt, definitive determination shorn of the confusing inconsequential defenses so typical of Government legalese these days. The defendants' motion to dismiss is denied.

The controlling question on the merits is whether the money authorized under the legislation was appropriated to be spent at the discretion of the Executive, or appropriated with an affirmative direction that the money be fully spent within the fiscal year. This issue is to be resolved without regard for the merits or demerits of the particular program involved, although it is perhaps of some significance in weighing the matter to note that this particular appropriation does not affect our foreign or military affairs. Rather, it falls squarely in an area of domestic concern in which the President's responsibility to execute the laws must be viewed without regard to issues of national defense or foreign policy, where the Constitution may recognize some special authority of the President to deal with developing conditions.

The defendants emphasize the overall economic problems confronting the nation, the heavy demand for funds in areas where national security considerations abound, and the absence of any national procedure for reconciling various appropriations in the light of current budgetary pressures, in part exacerbated by debt limitations. All of this is indeed pertinent, but whatever may be the President's power to limit expenditures to accommodate the total moneys available, he does not have complete discretion to pick and choose between pro-

grams when some are made mandatory by conscious, deliberate congressional action. At least with respect to the programs involved here, there is no basis for defendants' assertion of inherent constitutional power in the Executive to decline to spend in the face of a clear statutory intent and directive to do so. Kendall v. United States ex rel. Stokes, 37 U.S. 524, 9 L.Ed. 1181 (1838); Youngstown Street & Tube Co. v. Sawyer, 343 U.S. 579, 72 S.Ct. 863, 96 L.Ed. 1153 (1952); State Highway Comm'n v. Volpe, 479 F.2d 1099 (8th Cir. 1973); Local 2677, Am. Fed'n Gov't Employees v. Phillips, 358 F.Supp. 60 (D.D.C. 1973).

The Court concludes that Congress intended to require a full commitment of the fiscal 1973 appropriated funds by the end of the fiscal year. This intent is established by the following facts and circumstances, among others.

Through the Act, Congress has constructed an elaborate scheme to advance the cause of community mental health treatment, and has continually appropriated money to achieve the purposes of the Act. The object of the Act is to provide federal money to establish new community mental health centers and programs throughout the nation. Once begun, the federal moneys continue to be available in succeeding years at somewhat reduced levels. In extending the program to make available initial grants in additional fiscal years, Congress has necessarily also permitted additional centers to be eligible for the substantial succeeding year grants. In the face of vast unmet mental health needs throughout the nation, Congress has continuously appropriated money for new grants to extend the benefits of the Act. The Act was never viewed by Congress as a demonstration program to get communities to follow the examples of others and start their own centers, but rather a national effort to

redress the presently wholly inadequate measures being taken to meet increasing mental health treatment needs.[2]

The defendants' present efforts to shut down these programs, perhaps in favor of others, on the grounds these initial general funding grants were for demonstration programs and have served their purpose, is not only inconsistent with the Act, its continuing support and expansion by Congress, and the congressional intent found in the legislative history, but is a view recently explicitly rejected by Congress in extending the programs, with appropriations, through fiscal 1974, so that community facilities can be further expanded[3] Therefore, while the internal language of this Act is "discretionary," it would appear Congress did not intend that the Executive shall have discretion simply to end the program in total without regard to the essential purposes of the Act. *See* State Highway Comm'n v. Volpe, *supra.*

Given this intent, the question then arises whether this intent was anywhere made sufficiently explicit by the statutes as to constitute a mandatory directive to the President. Subsequent to the passage of the Act, an amendment (herein after "Section 601") was enacted which provided as follows:

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[2]*See, e.g.,* S.Rep.No. 92-1064, 92d Cong., 2d Sess. 38-49 (1972); S.Rep.No. 91-583, 91st Cong., 1st Sess. (1969); H.R.Rep. No.91-735, 91st Cong., 1st Sess. (1969); S.Rep.No.294, 90th Cong., 1st Sess. (1967); H.R.Rep.No.212, 90th Cong., 1st Sess. (1967), U.S.Code Cong. & Admin. News 1967, p. 1252; S.Rep.No.366, 89th Cong., 1st Sess. (1965); H.R.Rep.No.248, 89th Cong., 1st Sess. (1965), U.S.Code Cong. & Admin. News 1965, p. 2401; S.Rep.No.180, 88th Cong., 1st Sess. (1963); H.R.Rep.No.694, 88th Cong., 1st Sess. (1963), U.S.Code Cong. & Admin. News 1963, p. 1054.

[3]Health Programs Extension Act of 1973, Pub.L.No. 93-45, §§203 and 207, 87 Stat. 94 (June 18, 1973); 87 Stat. 130 (1973); H.R.Rep.No.93-227, 93d Cong., 1st Sess. 10 (1973).

> Notwithstanding any other provision of law, unless enacted after the enactment of this Act expressly in limitation of the provisions of this section, funds appropriated for any fiscal year ending prior to July 1, 1973, to carry out any program for which appropriations are authorized by . . . or the Mental Retardation Facilities and Community Mental Health Centers Construction Act of 1963 (Public Law 88–164, as amended) *shall remain available for obligation and expenditure until the end of such fiscal year.* Medical Facilities Construction and Modernization Amendments of 1970, Pub.L.No. 91–296; Title VI, §601, 84 Stat. 353, 42 U.S.C.A. §§201 note and 2661 note (emphasis added).

While the meaning of the language "shall remain available for obligation and expenditure until the end of such fiscal year" is not readily apparent on its face nor free from doubt, read in the light of the legislative history of Section 601 and the meaning commonly given and accepted for such language,[4] the Court must conclude that this provision makes mandatory the spending of funds appropriated under the Act for fiscal 1973.

Before initial passage by Congress, the Executive recognized that all other statutory provisions notwithstanding, Section 601 converted "HEW health-related programs into mandates to spend regardless of considerations of commonsense economy and prudent use of the taxpayers' money." Letter from Robert P. Mayo, Director, Bureau of the Budget, to Rep. Harley D.

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[4]Language like that used in Section 601 has previously been used by Congress with the intent to make mandatory the spending of appropriated funds. Such an intent of similar language has been recognized by the Executive, and the courts have so interpreted it. See 20 U.S.C. §1226 and 23 U.S.C. §118(a); S.Rep.No. 91-634, 91st Cong., 2d Sess. 78-79 (1970); 114 Cong.Rec. 29014-16 (1968) (remarks of Senators Morse and Yarborough); State Highway Comm'n v. Volpe, *supra.*

Staggers, May 11, 1970. This section was originally a Senate amendment and its mandatory nature was agreed to by the House conferees only after it was limited to funds for fiscal years through 1973 and to the three health programs with the greatest needs. Moreover, the floor debates and committee reports reflect a clear understanding that Section 601 made spending mandatory "to prevent administration imposed freezes, reductions and rollbacks from applying to health programs." H.R.Rep.No.91–1167, 91st Cong., 2d Sess. 25–26 (1970). *See* 116 Cong.Rec. 22266, 22267, 22268, 22271–73 (1970) (remarks by Senators Yarborough, Dominick, Javits and Kennedy). The President vetoed Section 601 principally because Congress was insisting that fiscal 1973 funds "to carry out the programs involved must be spent." 116 Cong.Rec. 20876 (1970) (Veto Message of President Nixon). With this meaning clearly in mind, Congress overrode the President's veto. Finally, with this legislative background and the current debate over Executive spending well in mind, Section 601 has recently been extended through fiscal 1974. The Health Programs Extension Act of 1973, Pub.L.No. 93–45, §401(a), 87 Stat. 95 (June 18, 1973). In so doing, the committee reports make explicitly clear that the language in question here requires the expenditure of funds. H.R.Rep.No.93–227, 93d Cong., 1st Sess. 10 and 15 (1973).

Money has been appropriated to achieve the purposes of the Act and the defendants are given the non-discretionary statutory duty to spend those funds for grants that meet the pre-February 23, 1973, lawful criteria embodied in rules and regulations promulgated to achieve the purposes of the Act. The defendants have no residual constitutional authority to refuse to spend the money. Accordingly, the plaintiffs' motion for summary

judgment is granted and the motion of defendants for summary judgment is denied. An appropriate Final Order accompanies this Memorandum Opinion.

As to the question of relief, the Court must address one point pressed by plaintiffs. Because the Act, Section 601, and supporting appropriations have in effect been carried over to fiscal year 1974 (87 Stat. 94 and 95, §§203, 207, 401(a) (1973), and 87 Stat. 130 (1973)), plaintiffs seek relief applicable to fiscal year 1974 as well as 1973. The Court must decline such relief. There is no controversy as to fiscal 1974 before the Court and ripe for determination. Congress has various proposals under consideration which may affect this controversy, and the Executive has substantial time in which to formulate a position on expenditure of 1974 funds before new applicants would face injury. If and when such injury is real, those aggrieved can proceed by a separate action.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1223-73

NATIONAL COUNCIL OF COMMUNITY MENTAL HEALTH CENTERS, INC., ET AL., on behalf of themselves and others similarly situated,

Plaintiffs,

v.

CASPAR WEINBERGER, ET AL.,

Defendants.

FINAL ORDER

In accordance with the Court's Memorandum Opinion filed this day, it is hereby

ORDERED that on or before September 1, 1973, defendants shall:

(1) take all steps necessary to review under normal procedures and criteria in effect prior to February 23, 1973, all pending applications for first-year grants for community mental health centers staffing, initiation and development, and for construction and staffing of mental health treatment centers for children under the Community Mental Health Centers Act, as amended, 42 U.S.C. §§2688-2688d, 2688u;

(2) submit all qualifying applications reviewed by HEW Regional Offices to the National Advisory Mental Health Council for approval;

(3) decide, through Regional Directors or otherwise, but in accordance with all regulations and requirements in effect prior to February 23, 1973, which grant applications approved by the National Advisory Mental Health Council shall be funded and in what amount, in order

that the full $52,050,000 of appropriated funds available shall be awarded in grants;

(4) take all steps and prepare all documents necessary legally to notify grantees of their awards under (3) above and to obligate to said grantees their share of $52,050,-000 appropriated for expenditure;

(5) take the necessary steps to send by check to grantees their grant awards in accordance with established funding control procedures; and it is

FURTHER ORDERED that this Order shall not be stayed by this Court pending appellate review and plaintiffs shall have their normal costs for this litigation.

/s/ Gerhard A. Gesell

UNITED STATES DISTRICT JUDGE

August 3, 1973

NATIONAL COUNCIL OF COMMUNITY MENTAL HEALTH CENTERS, INC., et al., Plaintiffs,

v.

Caspar WEINBERGER, et al., Defendants.

Civ. A. No. 1223-73

United States District Court, District of Columbia.

Dec. 20, 1974.

* * *

Jerome S. Wagshal, pro se.

Guy W. Shoup, Eliot S. Gerber, New York City, Patrick J. Moran, Washington, D.C. for NCCMHC.

Bruce Titus, Dept. of Justice, Washington, D.C., for defendants.

MEMORANDUM AND ORDER

GESELL, District Judge.

One hundred thirty-eight community mental health centers, certified by the Court as a class under Rule 23(b)(1) and (b)(2) of the Federal Rules of Civil Procedure, prevailed in this action to set aside an impoundment order. As a result, the Secretary of Health, Education and Welfare released previously withheld appropriations amounting to $52 million which Congress had previously authorized for fiscal 1973. National Council of Community Mental Health Centers, Inc. v. Weinberger, 361 F.Supp. 897 (D.D.C. 1973). Shortly after the appeal from that order was abandoned, various related petitions were filed asking the Court to order that Jerome A.

Wagshal, Esquire, attorney for the named representatives of the class, be compensated by H.E.W. or the class for his services. Voluminous papers, including affidavits, were filed, testimony was taken and notice given by mail to all members of the class.

The original complaint and applications by both the class and Mr. Wagshal ask attorney's fees on behalf of the class from the Government defendants. The law is settled that, in the absence of specific statutes to the contrary, attorney's fees may not be awarded against the Government. 28 U.S.C. §2412; United States v. Chemical Foundation, 272 U.S. 1, 20, 47 S.Ct. 1, 71 L. Ed. 131 (1926); United States v. Worley, 281 U.S. 339, 50 S.Ct. 291, 74 L.Ed. 887 (1930); Pyramid Lake Paiute Tribe v. Morton, 499 F.2d 1095 (D.C.Cir. 1974), cert. denied ___ U.S. ___, 95 S.Ct., ___, 42 L.Ed.2d ___ (1975). This rule applies with equal force in cases nominally brought against officers of the Government relating to their official duties. *See* 6 J. Moore, Federal Practice (2d ed. 1971) ¶54.75[4].

While it would be equitable in this instance to require the Government to compensate the members of the class for their legal expenses incurred in a suit to obtain appropriated funds wrongfully withheld by the Executive Branch, the Court lacks the power to do so since there is no authorizing statute.

In another application, Mr. Wagshal asks the Court to assess attorney's fees for his personal benefit against the members of the plaintiff class *in personam*. The Court also lacks the power to do this. Unlike an action *in rem*, where control of the *res* coupled with mail notice has been held to satisfy due process, Mullane v. Central Hanover Trust Co., 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950), the power of a court to render binding *in personam* judgments depends on personal

jurisdiction which is usually acquired via service of process. *See* Pennoyer v. Neff, 95 U.S. 714, 24 L.Ed. 565 (1878). However, in class actions, it has been recognized that the power of the Court to render binding *in personam* judgments consistent with due process finds its source in the presence of adequate representatives of the class before the court even though no process was served. Hansberry v. Lee, 311 U.S. 32, 61 S.Ct. 115, 85 L.Ed. 22 (1940). In such circumstances, however, the Court must "carefully scrutinize the adequacy of representation." 3B J. Moore, Federal Practice (2d ed. 1974) ¶ 23.07[1] at 23-357; Eisen v. Carlisle & Jacquelin, 391 F.2d 555, 562 (2d Cir. 1968) (Eisen II). This is particularly true in a case such as the present one where the class was not structured as a (b) (3) class, and class members were never given an opportunity to opt out of the litigation. *See* Appleton Electric Co. v. Advance-United Expressways, 494 F.2d 126, 140 (7th Cir. 1974).

While it is true that the Court earlier certified the named plaintiffs as adequate representatives of the class under Fed.R.Civ.P. Rule 23(b) (1) and (b) (2) for purposes of the merits of the original action, that phase of the action presented quite different questions. The Court was not advised or aware at the time of certification that attorney's fees would be sought from benefiting class members.[1] See Fed.R.Civ.P. Rule 23(c)

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[1]Mr. Wagshal was originally retained to bring this litigation by the National Council of Community Mental Health Centers, Inc., an association of some, but not all, the community mental health centers which comprise the class. The agreement between the National Council and Mr. Wagshal, of which the Court was unaware until the present applications were filed, provided that the National Council would pay Mr. Wagshal, a minimum hourly fee and expenses, but that in the event the litigation was successful, an application would be made for an additional fee to be fixed by the Court "in an appropriate amount" from benefiting class members. A series of letters from the National Council to members of the class advised them informally of this arrangement, although it cannot be said they all agreed to it or understood its implications.

(4) (A), Rule 23(c) (1); Local Rule 1–13(a) (2) (ii).

The Court in its discretion has determined that the representation of class members has been inadequate to support *in personam* judgments for attorney's fees against the class members. None of the community mental health centers originally named as plaintiffs and certified as representatives of the class has appeared by separate attorney in the portion of the case relating to Mr. Wagshal's fee applications. *See* 3B J. Moore, Federal Practice, supra. ¶ 23.-07[1] at 23–360, n. 39. While the National Council did eventually retain separate counsel in the fee proceedings, it has expressly disclaimed the ability to represent the class. Moreover, it is not a member of the class since it received no funds released by this litigation, *see* Bailey v. Patterson, 369 U.S. 31, 32–33, 82 S.Ct. 549, 7 L.Ed.2d 512 (1962), and its interests are antagonistic to those of the class on several issues because, among other things, it is seeking return of the fees it has already advanced to Mr. Wagshal as front money. *See* 3B J. Moore, Federal Practice, *supra*, ¶¶ 23.-07[2], [3]. No adequate representative of the interests of the class being present in this proceeding, the Court is unwilling and unable to enter *in personam* judgments against the members of the class.[2]

Payment of attorney's fees is also sought through still another route. The record discloses that a portion of the money released by the litigation remains unused. The amount is more than sufficient to pay any reasonable attorney's fee in this situation and is still subject to the Court's control as a result of orders entered during the

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[2]This problem in no way affects the Court's power to award fees against a fund, *see infra*, since this power is *not* founded on the existence of a class action. *See* Sprague v. Ticonic Nat. Bank, 307 U.S. 161, 167, 59 S.Ct. 777, 83 L.Ed. 1184 (1939).

proceedings, even though the precise accounting as to this sum must await final auditing.

It remains, therefore, to determine whether attorney's fees can be assessed against this unexpected fund held by H.E.W. The law is settled that where a fund has been created in litigation with the Government, and the Government stands as it does here in the position of a stakeholder required to pay over that fund to qualified beneficiaries, the Court may award a portion of it to the attorney for the beneficiaries as "costs between solicitor and client." Lafferty v. Humphrey, 101 U.S.App.D.C. 222, 248 F.2d 82, cert. denied sub nom., Benton County v. Lafferty, 355 U.S. 869, 78 S.Ct. 118, 2 L.Ed.2d 75 (1957); Emmet v. Whittier, 164 F.Supp. 563 (D.D.C.1958). *See also,* United States v. Anglin & Stevenson, 145 F.2d 622, 629 (10th Cir. 1944). Thus the Court has authority to reimburse the actual plaintiffs or their lawyer for their efforts on behalf of the class by assessment for attorney's fees against the fund.[3] Paris v.

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[3] H.E.W. also contends that a final order was entered and that Rule 59(e) prohibits reopening for consideration of attorney's fees after ten days. The class by its representatives petitioned for attorney's fees from the outset. The rule does not apply where costs in the form of attorney's fees are sought by the eventually successful party from a common fund created by the litigation. See 6 J. Moore, Federal Practice (2d ed. 1971) ¶54.77[2]. Not only are costs usually taxed only after appeal, but in a fund case judicial economy requires that the viability of the fund be first established finally before expenses to be taxed against it are considered. *See* 6 J. Moore, Federal Practice (2d ed. 1971) ¶54.77[9].

The case of Stacy v. Williams, 50 F.R.D. 52 (N.D.Miss.1970), affirmed, 446 F.2d 1366 (5th Cir. 1971), relied on by defendant, is not to the contrary. That case followed Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714, 87 S.Ct. 1404, 18 L.Ed.2d 475 (1967), which in turn explicitly recognized the "common fund" cases as an exception to the American rule that attorney's fees are not generally part of the prevailing parties' costs. *See* 386 U.S. 718-719, 87 S.Ct. 1404.

Metropolitan Life Ins. Co., 94 F.Supp. 792 (S.D.N.Y.1947); Lafferty v. Humphrey, *supra*.

The applications may fairly be construed to include an application by the named plaintiffs to be reimbursed for legal expenses incurred by them as representatives of the class in creating a fund for the benefit of the class as a whole. Fed.R.Civ.P. Rule 8(f). Since such a fund still exists, the applications viewed in this light will be granted for it is clear that the representatives of the class incurred legal expenses in creating the fund for the benefit of all class members. Trustees v. Greenough, 105 U.S. 527, 26 L.Ed. 1157 (1882); Mills v. Electric Auto-Lite Co., 396 U.S. 375, 389–397, 90 S.Ct. 6161, 24 L.Ed.2d 593 (1970); Hall v. Cole, 412 U.S. 1, 93 S.Ct. 1943, 36 L.Ed.2d 702 (1973); Annot., 38 A.L.R.3d 1386 (1971); J. Dawson, "Lawyers and Involuntary Clients: Attorney Fees from Funds," 87 Harv.L.R. 1597 (1974).

It is recognized that this will reduce the fund by the amount of the fee awarded and that under the budget and accounting procedures of H.E.W. this may affect the sum available in the next fiscal year for similar grants. Nothing herein shall be taken in any way to restrict or to limit the right of H.E.W. to reduce future grants to members of the class by their pro rata share of the fee paid from the fund.

The substantial material received from members of the class following notice and presentation by new counsel for the National Council as well as Mr. Wagshal provide sufficient basis for the Court to proceed to fix a fee.[4]

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[4] "H.E.W. has not indicated any view as to the appropriate amount of a fee and sought to be heard later on this question if a fee is to be awarded against the fund. Counsel for H.E.W. was informed prior to the October 31, 1974, hearing that he should

[footnote continued]

This litigation involved a fairly narrow controversy. It was resolved without trial by motions over a period of a month and a half, although Mr. Wagshal spent additional time in legislative efforts involving this and other cases. Mr. Wagshal's clients were and are well satisfied with his professional efforts and as far as his work on the merits is concerned, it was of high quality. He seeks a fee of $1 million. The National Council suggests an additional fee of $43,979; some members of the class opposed any fee, while some indicated a willingness to pay a pro rata share of a fee that would range upwards somewhat beyond $100,000.

Mr. Wagshal strenuously urges that he not be compensated on a time basis. He contends that he took the retainer, after several other attorneys had refused, primarily on a contingent basis and since the contingency eventuated he should be paid solely in relation to the sum released from impoundment, here approximately $52 million. There is no merit in this suggestion. *See* Ratner v. Bakery & Confectionary Workers Union, 122 U.S. App.D.C. 372, 354 F.2d 504, 506 (1965) (rejecting a "pro forma scale" for fixing attorney's fees on a quantum merit basis). The amount released was determined by Congress, not by the litigation. The only contingency was whether or not the plaintiff class would win or lose. In other words, his work contributed in no way to the amount of the award but only to the fact of the award itself. If he lost he would have received only the "front money" under his agreement with the National Council. Since he won he should receive recognition for the result but not on any percentage computation based on the recovery.

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submit whatever he wished regarding the amount of the fee at said hearing, and counsel also was given the opportunity to submit a post-hearing brief on this matter. In any event, H.E.W. is a mere stakeholder and its views are immaterial."

Mr. Wagshal also contends that the Court as a matter of policy should award a fee "at the outer limit of reasonableness" to encourage other private attorneys to undertake litigation of a public interest nature. He points out that some of this type of litigation is unpopular (this was clearly not such a case) and such causes are not always well compensated. He urges that a fee of $1 million would be at the level which he believes large firms would have charged commercial clients and feels his routine time charges contrast unfavorably with these fee charges and the compensation of professional athletes and other personalities. This line of argument is rejected. It is not the function of the Court in setting fees to do more than provide reasonable compensation for work done. Mr. Wagshal should be reasonably paid for his useful time, plus a bonus for the result. Nothing more is warranted, particularly where the fee is to be paid from funds appropriated by the Congress for a far more useful purpose, assistance to the mentally ill.

Upon a careful examination of Mr. Wagshal's account of time logged, a number of problems immediately are presented. As a sole practitioner, his work was at many different gradations of professional responsibility and no flat hourly rate can reasonably be applied to his work as a whole. A considerable amount of his time presentation is based upon loose estimates. It is also striking to note that more than half the time claimed is to compensate him for his efforts to obtain compensation. While the Court must, of course, consider time required to obtain compensation, it is apparent that Mr. Wagshal has spent considerably more time in this direction than the situation required. His fee papers are prolix, repetitive and excessive. This aspect of his time must be substantially discounted, particularly since much of it was spent on what appear to be irrelevancies. On the affirmative side,

Mr. Wagshal worked energetically with full devotion to his client. His papers on the merits were of good quality and perceptive. The Court must also take into account that because of friction that arose between him and members of the class during the fee controversy it is not likely that there will be any repetitive business obtained from the class by reason of his efforts.

More and more, United States District Courts are being called upon to fix fees. There is no rule of thumb that can be applied and essentially the Court must exercise judgmental factors quite comparable to those employed by private attorneys when billing clients. The determination of a proper fee for legal services is not an exact science. A few considerations are generally applied in this community. Larger firms emphasize time billing of regular clients. Smaller firms have lower time charges and rely more on contingent arrangements, thus, in effect, becoming party to the litigation. All billing is designed to keep or develop the client. Where legal representation, is known to involve no prospect for future billing, fees are higher. There is no standard rate in this community even as between lawyers of comparable ability and responsibility. Some lawyers take into account their reputation and level of past earnings. All are concerned with whether the work has distracted them from other obligations. Results always affect the client's receptivity to the fee suggested. The practices of immediate competitors and a feel for the client's ability to pay must always be recognized. And so it goes.

When a judge sets a fee he seeks to get a feel for these factors, when applicable, intangible and uncertain as they may be. In addition, the Court must appraise the work of the attorney as he saw it from papers submitted and appearances in court.

In this case, like some other public interest litigation, the attorney seeks compensation from public funds created by Congress to serve a wholly different purpose. The attorney should be paid an adequate fee for his work but that is all. The attorney's interest and the public's cannot be differentiated and to a substantial degree he serves as an officer of the Court to help vindicate a right in the interested segment of the community that needed his help. Thousands of lawyers serve the Government at modest pay and perform services of equal import to the larger public interest. Those lawyers who choose the commendable course of serving the public interest rather than building a more remunerative commercial practice cannot expect the same financial awards as such practitioners sometimes achieve. The law is not a money-grubbing profession; windfalls should not be given to those who successfully represent persons not properly treated by our Government. Awarding of fees is not intended to accomplish other social purposes, nor is it the function of the Court to attempt to equalize financial awards for all types of legal work. Some legal fees in the private sector are excessive. It is becoming increasingly expensive to protect rights of citizens in court. It would be a gross mistake to make the highest level of charges in the private sector a measure of compensation to be paid all attorneys who seek to vindicate an identifiable public interest.

Taking into consideration that factors indicated and those delineated in Johnson v. Georgia Highway Express, Inc., 488 F.2d 714 (5th Cir. 1974), and other pertinent cases, the Court has determined that a reasonable award for the time expended in this case is $50,000, and that an additional $15,000 should be awarded for the result, making a total fee of $65,000 in full compensation for legal services rendered the class. This fee shall be paid by

H.E.W. from the fund directly to Mr. Wagshal for convenience, *see* Wewoka, Okl. v. Banker, 117 F.2d 839, 844 (10th Cir. 1941), after deducting $13,216.24, representing attorney's fees already paid him by the National Council for his work in this case.. This amount of $13,216.25 shall be paid directly by H.E.W. to the National Council for it to use solely to reimburse individual class members in like amounts for whatever each contributed to the sum paid out for fees.

In all other respects the applications are denied. Out-of-pocket costs are not to be paid from the fund but are to be assessed against H.E.W. in the regular manner through the Clerk of Court.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 75-1335

NATIONAL COUNCIL OF COMMUNITY MENTAL HEALTH CENTERS, INC., ET AL.

v.

THE HONORABLE F. DAVID MATHEWS, INDIVIDUALLY AND AS SECRETARY OF HEALTH, EDUCATION AND WELFARE, ET AL.

JEROME S. WAGSHAL, APPELLANT

No. 75-1353

NATIONAL COUNCIL OF COMMUNITY MENTAL HEALTH CENTERS, INC., ET AL.

v.

THE HONORABLE F. DAVID MATHEWS, INDIVIDUALLY AND AS SECRETARY OF HEALTH, EDUCATION AND WELFARE, ET AL., APPELLANTS

Appeals from the United States District Court for the District of Columbia

(D.C. Civil Action 1223-73)

Argued April 21, 1976

Decided November 9, 1976

Jerome S. Wagshal, appellant, *pro se*, in No. 75-1335 and appellee *pro se* in No. 75-1353.

Eloise E. Davis, Attorney, Department of Justice, with whom *Rex E. Lee*, Assistant Attorney General, *Earl J. Silbert*, United States Attorney and *Leonard Schaitman*, Attorney, Department of Justice, were on the brief for appellant in No. 75-1353 and appellee Mathews, et al., in No. 75-1335.

Guy W. Shoup for appellee, National Council of Community Mental Health Centers, Inc.

Charles R. Halpern and *Joseph Onek*, filed a brief on behalf of council for Public Interest Law as *amicus curiae.*

Before: TAMM, MACKINNON and ROBB, *Circuit Judges*

Opinion for the Court filed by *Circuit Judge* TAMM.

TAMM, *Circuit Judge*: This case arises out of a district court order awarding Jerome Wagshal a $65,000 attorney's fee for successfully prosecuting a claim against the Department of Health, Education and Welfare (HEW) on behalf of the National Council of Community Mental Health Centers (NCCMHC).[1] The Secretary of HEW appeals from the district court's order that Wagshal's fee be paid out of unexpended federal grant funds. Wagshal also appeals arguing that the district court's reliance on a time basis computation formula instead of a percentage of the recovery formula resulted in an unreasonably low fee award. The NCCMHC argues in support of the district court's award

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[1] The suit on the merits brought about the release of $52 million of federal grants which had been authorized by Congress for fiscal year 1973 but which were illegally impounded thereafter by the President. National Council of Community Mental Health Centers, Inc. v. Weinberger, 361 F. Supp. 897 (D.D.C. 1973) (hereinafter referred to as *NCCMHC I*).

from the unexpended funds as it contends that the court lacked in personam jurisdiction over the individual class members and hence, was unable to charge them with payment of the fee.

Although we agree with the district court's determination of the amount of the fee and with its conclusion that it did not have the power to assess this fee against the individual class members, we find that the court erred in mandating that the attorney's fee be paid out of unexpended federal grant funds. We therefore reverse the judgment of the district court.

I. Factual Background

The federal grant funds involved here were part of the Congressional appropriations authorized under sections 220-224, 271 of the Community Mental Health Centers Act, 84 Stat. 56 (1970), *as amended* 42 U.S.C. §§ 2688-2688d, 2688u (Supp. V, 1975). The purpose of these grants is to assist public or non-profit private agencies in meeting the costs of construction of mental health facilities for children and to help pay part of the costs of the professional and technical personnel who operate these facilities. Responsibility for the administration of these grants lies with the Secretary of Health, Education and Welfare.

HEW released the impounded 1973 grants to the individual class members [2] after the proceedings on the merits indicated that they had been illegally withheld. A portion of these 1973 grant monies remained unused at

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[2] In the suit on the merits the district court certified a class consisting of 138 community mental health centers, some of which are members of the National Council of Community Mental Health Centers, Inc., pursuant to Fed. R. Civ. P. 23(b)(1) and (2). All of these individual class members had applied for first-year grants for fiscal year 1973. *NCCMHC, I*, 361 F. Supp. at 899-900.

the time Wagshal instituted his suit for a fee, almost one year after the conclusion of the litigation on the merits.[3] Due to orders entered in the prior proceedings these unexpended funds did not lapse at the end of the fiscal year as would normally occur; rather, they were still subject to the control of the court.

The manner in which these federal grant funds are disbursed is particularly important here. Under normal operating procedures, the initial grant is made for the estimated cost of the first year of the project. Should this cost estimate be high in relation to the expenses incurred by the grantee in the first year, the surplus or unexpended funds are included in the computations for future grants. An estimate of the unexpended balances in all of the grantees' accounts at the end of a current budget period is made based on historical averages and then sufficient funds are appropriated to meet the next year's estimated grants. In this way, the unexpended federal grant funds are a significant factor which Congress takes into account each year in formulating the federal budget. *See* J.A. at 434-35. Should the grantee seek a continuation award for the next year, HEW computes the amount of the grant on the basis of the estimated cost of the program for that year less the grantee's matching funds and the unexpended balance remaining from the previous year's grant.[4]

The NCCMHC retained Wagshal pursuant to an agreement which provided that the NCCMHC would pay him a minimum hourly fee and expenses (amounting to $13,216.25), and if the litigation were successful, an additional fee would be sought from the benefitting class

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[3] National Council of Community Mental Health Centers, Inc. v. Weinberger, 387 F. Supp. 991, 994 (D.D.C. 1974) (hereinafter referred to as *NCCMHC II*).

[4] *See* Affidavit of John P. Spain, J.A. at 433-34.

members through application to the court.[5] These benefitting class members were not parties to the retainer agreement and the district court was not aware at the time of certification that attorney's fees would be sought from them.[6] Wagshal made no reference to his fee arrangement in any of his original pleadings. The class members were only informally advised of the retainer provisions by the NCCMHC. No evidence that they agreed to or understood the implications of the agreement was submitted to the district court.[7] None of the class members were ever given an opportunity to opt out of the litigation and none appeared by separate attorney in this fee application case.

II. Issue Analysis

The long-standing "American rule" on the payment of attorney's fees in the absence of a statute or enforceable

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[5] The retainer provision in the agreement reads:

> II. *Class Fee*
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> It is understood that the above hourly rate [$35.00] and initial retainer is substantially less than would normally be charged for a matter of this nature. The proposed action will be filed as a class action on behalf of a class of community mental health centers, as well as the National Council. If, as a result of this litigation, a substantial benefit is conferred upon the plaintiff class, it is agreed that we will apply to the Court for an appropriate fee award from those class members benefiting therefrom. The Court-determined counsel fee would not be drawn in any measure from the National Council, whose obligations are fully stated in the preceding paragraph. In determining the appropriate amount of counsel fees to be awarded with respect to class members, the Court will be advised of and take into account the amount of funds provided by the National Council.

Wagshal Brief at 12 n.15.

[6] *NCCMHC II*, 387 F. Supp. at 993.

[7] *Id.* at 993-94 n.1.

contract is that each party pays his own. This rule however is not absolute. Over the years, judicially-created exceptions have been grafted onto the rule. A successful party can now be awarded attorney's fees if his opponent has acted in bad faith or if a substantial benefit has been conferred on a class of persons.[8] *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 245 (1975). The problem which faces us is determining whether an exception to the American rule is applicable here.

The most troublesome obstacle which we encounter is embodied in 28 U.S.C. § 2412 (1970) which provides:

> Except as otherwise specifically provided by statute, a judgment for costs, as enumerated in section 1920 of this title *but not including the fees and expenses of attorneys* may be awarded to the prevailing party in any civil action brought by or against the United States or any agency or official of the United States acting in his official capacity, in any court having jurisdiction of such action. A judgment for costs when taxed against the Government shall, in an amount established by statute or court rule or order, be limited to reimbursing in whole or in part the prevailing party for the costs incurred by him in the litigation. Payment of a judgment for costs shall be as provided in section 2414 and section 2517 of this title for the payment of judgments against the United States.

(Emphasis added). If we find that the unexpended grant funds belong to the United States rather than to the grantees and we cannot find a specific statute providing for the award of attorney's fees against the United

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[8] *See also* F.D. Rich Co. v. United States *ex rel.* Industrial Lumber Co., 417 U.S. 116, 129-30 (1974); Hall v. Cole, 412 U.S. 1, 4-5 (1973); Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714, 718-19 (1967).

States in this situation, the district court's fee award cannot be upheld.

We find that the manner of disposition of these unexpended funds is conclusive evidence of their true ownership. As noted previously, these unexpended funds are one factor taken into account in determining the amount of future grants which each grantee will receive. These funds do not remain at the grantee's disposal if they have not been "expended" by the end of the fiscal year.[9] It is only through a subsequent continuation grant approved by HEW that a grantee can again reach these unexpended funds which it failed to use the previous year. These unexpended funds are thus in the safekeeping of the public treasury until their use is once again authorized. *See* 42 Comp. Gen. 289, 294 (1962). An award of attorney's fees from these funds therefore would be an award against the United States and contrary to 28 U.S.C. § 2412, unless another statute specifically authorizes this award.

No statute has been brought to our attention which changes the rule of section 2412 in this situation. The authorization legislation for the appropriation of these funds includes a detailed listing of the purposes for which these grant monies are to be used. Community Mental Health Centers Act, §§ 220, 271, 42 U.S.C. §§ 2688, 2688u (1970). These purposes do not include the payment of attorney's fees. Similarly, the HEW implementing regulations do not provide for the payment of attorney's fees such as are sought here. *See* 42 C.F.R. § 54.303 (1975). Indeed, one subsection of the uniform adminis-

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[9] "[F]unds can be 'expended' only by disbursing them to grantees pursuant to a billing for costs incurred, or a request for an advance payment for costs to be incurred, in the operation of grant supported projects." J.A. at 432.

trative requirements and cost principles regulations which apply to these grants [10] provides:

> (d) Costs of legal, accounting and consulting service[s], and related costs, incurred in connection with . . . the prosecution of claims against the Government, are unallowable.

45 C.F.R. Part 74, Subpart Q, Appendix F, § G-31(d) (1975). As these unexpended grant funds belong to the United States until HEW approves a subsequent continuation grant, and there is no specific stautory authorization for an award of attorney's fees against the United States which is applicable here, no attorney's fee may be awarded out of unexpended grant funds as the case falls squarely within the strictures of 28 U.S.C. § 2412. *See Pyramid Lake Paiute Tribe of Indians v. Morton*, 449 F.2d 1095, 1096 (D.C. Cir. 1974), *cert. denied*, 420 U.S. 962 (1975).

The district court sought to circumvent this statutory prohibition by relying on its historic equity jurisdiction to award attorney's fees as costs "as between solicitor and client." [11] The exception it applied is commonly referred to as the "common benefit" or "common fund" exception. This exception means that if a party preserves or recovers a fund for his benefit and the benefit of others, he is entitled to recover his costs, including attorney's fees, from the fund or directly from the other parties enjoying the benefit. *National Treasury Employees Union v. Nixon*, 521 F.2d 317, 320-21 (D.C. Cir. 1975). The district court premised its application of this exception on a finding that the United States is a mere

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[10] 42 C.F.R. § 54.309 (1975).

[11] *NCCMHC II*, 387 F. Supp. at 994. *See also* Sprague v. Ticonic National Bank, 307 U.S. 161, 164-65 (1939); Lafferty v. Humphrey, 248 F.2d 82, 84 (D.C. Cir.), *cert. denied sub nom.* Benton County v. Lafferty, 355 U.S. 869 (1957).

"stakeholder" of the unexpended funds at issue here.[12] In doing so, it relied on *Lafferty v. Humphrey*, 248 F.2d 82 (D.C. Cir.), *cert. denied sub nom. Benton County v. Lafferty*, 355 U.S. 869 (1957). *Lafferty*, like the case *sub judice*, was a fee application case which arose out of a prior case on the merits which ordered the disbursement of certain land-grant funds improperly withheld by executive officials. *Clackamas County v. McKay*, 219 F.2d 479 (D.C. Cir. 1954), *vacated as moot*, 349 U.S. 909 (1955). However, the legislation providing for these funds in *Clackamas* specifically directed the executive officials "to disburse the balances left at the end of each year." *Id.* at 487. As the discussion *supra* indicates, this is contrary to the manner in which Congress has appropriated the grant funds with which we are concerned. Instead of providing for the complete expenditure of all grant funds each year, the legislature has relied on a certain surplus of funds from previous years to act as "seed money" for the following years' grants. *See* J.A. at 434. The government's position as "stakeholder" is *Clackamas* and *Lafferty* therefore[13] allows the award of counsel fees from those grant funds as all of those funds belonged to the grantees. This is not the case here. The United States is more than a mere stakeholder in this instance. It is the owner of the unexpended grant funds. The application of the common fund rule then immediately collides with the express provision of 28 U.S.C. § 2412.[14] We are therefore constrained to follow the specific statutory prohibition and disallow the award of attorney's fees under the common fund rationale.

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[12] *NCCMHC II*, 387 F. Supp. at 994.

[13] Lafferty v. Humphrey, *supra*, 248 F.2d at 84.

[14] The Supreme Court has recently recognized (but not resolved) the conflict arising between 28 U.S.C. § 2412 and judicially-created exceptions to the "American rule" when

The only other avenue of relief available to Wagshal is for the court to charge the individual class members with his $65,000 attorney's fee. As the district court discussed in full,[15] this alternative is not open to us. The class was properly certified under FED. R. CIV. P. 23(b)(1) and (2) for the purpose of litigating the merits of the impoundment case because the NCCMHC adequately represented the interests of the class members in that suit. However, the NCCMHC does not represent the interests of the individual class members in this fee application case. In this suit it merely seeks the return of its initial fee payment to Wagshal and supports the payment of his fee from the unexpended grant funds. As none of the individual class members ever made an appearance before the district court and there was no one else present to adequately represent their interests in the fee case, the district court properly found that it lacked in personam jurisdiction over the class and therefore could not award the fee against them. *Hansberry v. Lee*, 311 U.S. 32 (1940). One of the touchstones of due process required by a Rule 23 class action which was sorely lacking here, is that the class be adequately represented. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 176 (1974). Wagshal should have provided in his retainer agreement for full payment of his fee or else he should have structured his pleadings in the district court in such a way as to inform the court and class members that he would be seeking an additional fee if he were successful on the merits.

Finally, Wagshal contends that the amount of his fee should have been determined on a quantum meruit basis

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the United States or an agency thereof is a party to the litigation. Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240, 265-68 (1975).

[15] *NCCMHC II*, 387 F. Supp. at 993-94.

which would have resulted in a fee equal to a certain percentage of the $52 million released by HEW. We find that the district court properly followed the guidelines set forth in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974) which this court adopted in *Evans v. Sheraton Park Hotel*, 503 F.2d 177, 188 (D.C. Cir. 1974),[16] and that the fee of $65,000 was an eminently reasonable award in this case.

III. Conclusion

Although we recognize that Wagshal has rendered a significant service on behalf of the community mental health centers we cannot award him a reasonable fee. Title 28 U.S.C. § 2412 prevents us from charging the fee against the unexpended federal grant funds and the lack of in personam jurisdiction over the individual class members makes a fee award against them impossible. As the Supreme Court has recently stated, Congress has not "extended any roving authority to the Judiciary to allow counsel fees as costs or otherwise whenever the courts might deem them warranted." *Alyeska Pipeline Service Co. v. Wilderness Society*, *supra*, 421 U.S. at 260. The district court's award of attorney's fees must therefore be reversed.

So ordered.

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[16] *See also* Dawson, *Lawyers and Involuntary Clients in Public Interest Litigation*, 88 Harv. L. Rev. 849 (1975).

UNITED STATES COURT OF APPEALS

For the District of Columbia Circuit

September Term, 1976

Civil Action 1223-73

No. 75-1335

National Council of Community Mental Health Centers, Inc., et al.,

v.

The Honorable F. David Mathews, individually and as Secretary of Health, Education and Welfare, et al.

Jerome S. Wagshal,

Appellant.

Civil Action 1223-73

No. 75-1353

National Council of Community Mental Health Centers, Inc., et al.,

v.

The Honorable F. David Mathews, individually and as Secretary of Health, Education and Welfare, et al.,

Appellants.

BEFORE: Tamm, MacKinnion and Robb, Circuit Judges.

[Filed January 13, 1977]

ORDER

On consideration of the petition for rehearing filed by appellee-cross appellant Wagshal, it is

ORDERED by the Court that the aforesaid petition for rehearing is denied.

Per Curiam

For the Court:
/s/ George A. Fisher

George A. Fisher
CLERK

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